

ASSISTANCE ANIMALS: A POTENTIAL EXCEPTION TO YOUR ASSOCIATION'S "NO PETS" POLICY

Requests for assistance animals are one of the most common types of accommodation requests. In fact, in January 2020, the United States Department of Fair Housing and Urban Development (HUD) reported that 60% of all Fair Housing Act (FHA) complaints arise out of the denial of a request for reasonable accommodations and disability access. Of these complaints, the denial of a request for an assistance animal is one of the most common allegations, and the number of these regarding assistance animals is increasing.¹ Unless it is an undue burden, reasonable accommodations must be provided by housing providers to disabled individuals, who are those that have a "physical or mental impairment that substantially limits at least one major life activity."² A reasonable accommodation is a change or exception to a rule or policy that may be necessary to allow a disabled individual to enjoy the premises in the same manner as someone without a disability.³

The Fair Housing Act

The FHA defines an assistance animal as an animal that helps a person with a disability by helping them with tasks or that provides emotional support which reduces symptoms experienced by the disabled individual.⁴ An association must consider an accommodation request for an assistance animal even if the association has a "no pet policy." In fact, HUD makes it clear that an assistance animal is not a pet and therefore a "no pet policy is not applicable to a request for an assistance animal."⁵ A housing provider that is considering a request for a reasonable accommodation or disability-related need for an assistance animal should engage in the interactive process. The interactive process involves a conversation with the disabled individual to give them an opportunity to explain the basis of their request and an opportunity for the association and the disabled individual to explore potential accommodation options.

The FHA provides specific guidelines to assist in determining whether to grant an accommodation request for an assistance animal. The association may consider whether the person requesting the accommodation has a disability related to the need for the assistance animal. If the disability is observable, the association should not ask for additional information. However, if the disability is not readily apparent, the association may ask for documentation of the disability and the need for an assistance animal. A note from a health care provider, confirming the disability is usually

sufficient. Be aware though, that the association may not demand specific types of evidence of the person's disability such as details of the person's diagnosis, the severity of the person's condition, medical records or require a medical examination. If granting the request for an assistance animal would create a health hazard or create an unsafe condition, or could cause substantial harm to property, the association may be able to deny the request.⁶

Example:

In the case of Bhogaita v. Altamonte Heights Condo. Ass'n, Inc., the association advised Bhogaita that he could not keep his dog because the dog violated the association's 25 pound weight limit for pets.⁷ He responded that he had Post-Traumatic Stress Disorder (PTSD), and provided documentation from his doctor that the dog ameliorated the effects of his disability. The court found that the association violated the FHA because the association's actions had the effect of constructively denying the homeowner a reasonable accommodation. The homeowner was awarded \$5,000 in damages and \$100,000 in attorneys' fees, which was upheld on appeal.⁸

There are limitations, however, regarding what types of animals are considered assistance animals. Animals typically found in a home ("household animals") are acceptable. Dogs, cats, rodents, gerbils, fish, turtles, small birds, rabbits and hamsters are considered domestic animals and therefore permissible. Reptiles (that are not turtles), barnyard animals, monkeys (except specially trained capuchin monkeys that can perform tasks a service dog cannot), and kangaroos are not domesticated animals and a request to have one need not be accommodated. Animals which are not within these two categories may be considered a "unique" animal and it is the homeowner's responsibility to show why they have a need for that specific type of animal. Determinations should be made promptly, usually within 10 days of receiving documentation.⁹

The Americans with Disabilities Act

The Americans With Disabilities Act (ADA) applies to public spaces¹⁰ and as such, there may be situations where the community, or part of it, is open to the public and the ADA must be considered. Perhaps the pool can be rented out

by those that are not members of the association or there is an onsite restaurant where nonmembers can dine or a golf course where non-owners can pay to be members. If this is the case, the ADA will apply to those areas that are open to the public.¹¹ Under the ADA, animals that provide a service to their owner are called “service animals” and the ADA’s definition is narrower than the FHA’s definition of an assistance animal. The ADA defines service animals as dogs trained to work or perform a task for a person with a disability. If the dog provides emotional support to the disabled individual, the emotional support provided must be linked to a disability. Dogs that provide only emotional support to their owner are not considered service animals under the ADA. Miniature horses may also be considered a service animal if trained to do work or perform tasks for a person with a disability. Miniature horses are generally 24 to 34 inches and weigh up to 100 pounds. In determining whether a miniature horse should be considered a service animal, the miniature horse should: 1) be housebroken; 2) under the owner’s control; 3) be of a size and type that the establishment can accommodate; and 4) not create a hazardous condition.¹²

A service animal is generally permitted to go anywhere the public may go.¹³ Because it is considered a reasonable accommodation, this includes permitting a service animal in the community’s common areas or amenities even if

animals are not permitted.¹⁴ A service animal is required to be under the owner’s control, which usually means the owner must use a leash or harness unless doing so would hinder the dog’s ability to provide the intended service to the dog’s owner. If a physical method of control is not possible, control through voice or other means may be acceptable.¹⁵

Summary:

- Always consider a request by a homeowner for an assistance and/or service animal.
- Respond to the homeowner’s request promptly.
- An assistance animal is not a pet and a “no pet policy” does not apply.
- Be careful when requesting documentation of a disability.
- Consider seeking the advice of counsel.

Requests for assistance animals are quite common. Although associations make decisions based upon the association’s Covenants, Conditions and Restrictions (CC&Rs), policies and what they believe is in the best interest of the community, the law requires consideration of requests for assistance and/or service animals as a reasonable accommodation and a possible exception to the association’s policies.

Endorsed by:



Underwritten by:



Administered by:



ADDITIONAL RESOURCES

- <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>
- <https://www.ada.gov/resources/service-animals-2010-requirements/>
- <https://www.jdsupra.com/legalnews/homeowner-associations-and-service-2788753/>

¹ U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2020-01, January 28, 2020, pg. 4, <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf>

² Joint Statement of The Department of Housing and Urban Development And the Department of Justice Reasonable Accommodations under the Fair Housing Act, May 14, 2004, <https://www.justice.gov/crt/us-department-housing-and-urban-development>

³ U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2020-01, supra note 1

⁴ Assistance Animals, U.S. Department of Housing and Urban Development, https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals

⁵ Id.

⁶ Sharan E. Brown, ADA Knowledge Translation Center Legal Brief No. 2.4, ada National Network (2019), https://adata.org/legal_brief/assistance-animals-under-fair-housing-act-section-504-rehabilitation-act-and-air

⁷ *Bhogaita v. Altamonte Heights Condominium Ass’n, Inc.*, United States Court of Appeals, Eleventh Circuit, Nos. 13-12625, 13-13914 (Decided August 27, 2014).

⁸ *Ajit Bhogaita, Plaintiff-Appellee, v. Altamonte Heights Condominium Ass’n, Inc., Defendant-Appellant*, Animal Legal & Historical Center, Michigan State University, <https://www.animallaw.info/case/bhogaita-v-altamonte-heights-condominium-assn>

⁹ U.S. Department of Housing and Urban Development, FHEO Notice: FHEO-2020-01, supra note 1

¹⁰ Assistance Animals Under the Fair Housing Act, Fair Housing Project, A Project of Legal Aid of North Carolina, <https://www.fairhousingnc.org/assistance-animals-under-the-fair-housing-act/>

¹¹ Hans C. Wahl, Community Associations And The Americans With Disabilities Act (ADA), <https://www.cobbgonzalez.com/community-associations-and-the-americans-with-disabilities-act-ada/#:~:text=A%20condominium%20association%20that%20has.not%20apply%20to%20that%20association.>

¹² ADA Requirements: Service Animals (Last updated: February 28, 2020), <https://www.ada.gov/resources/service-animals-2010-requirements/>

¹³ Id.

¹⁴ Homeowner Associations and Service Animals in Common Areas Part 1: ADA Considerations, JDSupra (February, 2022), <https://www.jdsupra.com/legalnews/homeowner-associations-and-service-2788753/>

¹⁵ ADA Requirements: Service Animals, supra note 12

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